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Q&A on the revised copyright law

Clearer principles for photographs

The revised Copyright Act has been in force since 1 April 2020. All photos are now protected by copyright in Switzerland. Both professionals and amateurs alike are faced with numerous legal questions - renowned copyright expert [Dr. Reinhard Oertli](#) provides the appropriate answers.

1. is it true that every amateur picture has been protected by copyright since 1 April 2020?

Yes. According to the new Art. 2 para. 3^{bis} of the Swiss Copyright Act (CA), photographs are also protected if they were taken without the conscious use of design means and without intellectual considerations regarding the photographic staging etc. This applies, for example, to selfies or photographs of family members or objects (three-dimensional objects), without the photographer having to choose the place where the photograph is taken, the type of camera, a specific lens and fine adjustments (such as aperture and time).

The quality of the image is also irrelevant, *i.e.*, protected are also portraits with cut off heads or overexposed, blurred or blurred images. Images taken with a first generation smartphone camera or a LOMO camera are also protected.

2. I have taken a beautiful landscape photo and would like to have it protected by copyright. What do I have to do for it?

Nothing. Copyright protection is automatically created when the photo is taken. Registration is neither possible nor necessary. It is also not necessary to affix the copyright sign ©, but it is nevertheless recommended, as it indicates to third parties that copyrights exist for this photo and want to be observed. And if a name is added, this shows whom a person interested in using the photo can contact to obtain permission.

In general, it is advisable for reasons of evidence to document who took the photo and when. There are different techniques for this (*e.g.*, input into an electronic collection with an authentic date stamp), recently solutions using blockchains are also being discussed.

3. Does copyright protection also apply to product images?

Yes, photos of products were previously protected by copyright when they had individuality, and are now protected in any case, even if they do not meet this requirement.

4. Are photos from surveillance cameras and other machine-controlled cameras also protected?

No. Also protection by Art. 2 para. 3^{bis} CA requires a minimum of personal intellectual performance of a person. Photocopies, scans, prints from negatives, printouts of digitally stored works etc. do not constitute new protected photographic reproductions. Photographs of a surveillance camera or a device for speed monitoring triggered by a motion detector do not enjoy the protection of Art. 2 para. 3^{bis} CA, nor do individual photographs of permanently installed dashcams, webcams, weather satellite cameras etc. The details will result from future court practice.

However, it cannot be excluded that a machine is programmed by a human being in such a way that the conditions (time, chosen detail, etc.) of the individual photographs are determined by the machine, but that due to the corresponding programming of the machine the photographs nevertheless meet the minimum level of personal intellectual performance of the programmer for protection under Art. 2 para. 3^{bis} CA or the programmer's own intellectual creation for protection as a photographic work under Art. 2 para. 1 and para. 2 lit. g CA.

With regard to the technique chosen, the new provision is worded openly: it covers all forms of recording, holding and reproducing objects by means of chemical or digital sensors and carriers of light, infrared or X-ray radiation, ultrasound, computed tomography or magnetic resonance imaging and other radiation.

However, a visualisation of a virtual object created on a computer by means of electronic commands does not constitute a photographic reproduction within the meaning of Art. 2 para. 3^{bis} CA, even if the graphic thus created has the effect of a photograph, since it does not reproduce anything, but has been created entirely electronically. However, if the necessary originality is present, it can certainly enjoy copyright protection under Art. 2 para. 1 and para. 2 lit. g CA ("other visual ... works"). Even a composition of pre-existing photographs (photocomposing) may possibly create a new copyrighted work, but not a new photographic reproduction.

The protection also covers reproductions which are themselves three-dimensional in character (models calculated by photogrammetry, products made with a 3D printer) produced by a photographic or similar process.

5. What applies to photographs of two-dimensional originals such as photographs, photocopies of texts, plan copies, scans of graphic representations or of paintings and drawings?

The new regulation only protects photos that depict three-dimensional objects. All photographic reproductions of two-dimensional objects (paintings, drawings, plans, documents) are thus generally excluded from the newly created protection.

However, even at first glance, two-dimensional objects can have a third dimension if they are not shot frontally and if the graininess of the basic material (canvas) and the pasty application of paint become visible in the photograph.

6. Was there and is there no copyright protection of photographs apart from Art. 2 para. 3^{bis} CA?

Yes, a photo could and can still enjoy copyright protection as a photographic work if the photo has an individual character. There are therefore two parallel levels of protection for photographs under the Copyright Act, first as a photographic work (with an individual character) and then as a photographic reproduction (without individual character).

Originally, there was the expectation that photographs could be effectively protected by unfair competition law: Art. 5 lit. c Unfair Competition Act protects the marketable work result against transfer and exploitation as such by technical reproduction processes without reasonable effort on the part of the transferee. According to the unfortunate case law of the Federal Court, however, when determining the expenditure of the first parties entitled, one of the factors to be taken into account is whether he has already been able to amortise the costs of developing his work result. As the costs of individual photographs are usually not easy to determine and are often already covered, it is regularly difficult to prove that costs have not yet been amortised. This provision has therefore not really protected photographers.

7. Is my amateur snapshot now completely equal to an original photographic work by a professional photographer from a copyright perspective?

No, not completely. The owners of rights to photographic reproductions without individual character enjoy practically the same rights as those in photographic works of an individual character. This includes, in particular, the right to the photographer's name and protection against processing (see question 13).

However, the scope of protection of photographic reproductions is narrower. In particular, it is permissible to "re-take" a photograph without individual character, *i.e.*, to photograph the same section from the same position with the same camera settings. In the case of photographic works (with an individual character), however, such re-photographing would in principle not be permissible.

8. I want to redistribute or edit an older photo. Does the copyright protection end at some point?

Yes, original photographic works are protected for 70 years after the death of the author; photographic reproductions without individual character are protected for 50 years from the date of production. This period is difficult to determine for third parties. The date of publication is in no case relevant.

As soon as the corresponding term of protection has expired, the photo becomes in the public domain, *i.e.*, it is no longer protected by copyright. Public domain photos may be distributed or edited without permission and without naming the author.

9. I thought I was allowed to use other people's photos from the internet if there is no ©-sign or any other reference to copyright protection.

No, that is a common mistake. The ©-sign helps to clarify the legal relationships with third parties, but this does not mean that all works without the ©-sign may be used freely.

10. Does this mean that I am no longer able to use or distribute photos from others on my website or social media account?

No, it doesn't mean that. Use for personal use and further distribution in a private circle, *i.e.*, among family members and close friends, is permitted in any case. However, this does not in principle include uploading photos to the Internet, not even on Facebook and similar social media platforms. Even if the circle of distribution is restricted to persons who are also otherwise closely connected and further distribution is excluded, this barrier is unlikely to be applicable due to the general terms of use of most platforms.

If someone uploads photos to Twitter, Facebook or similar sites without clearly limiting the circle of addressees ("close friends"), it can be concluded that he or she agrees to the further distribution of these photos - at least in the same medium and in an unchanged context.

In any case, the use of photos as a quotation (picture quotation) for explanation, reference or illustration is and remains permitted, but not only for decorative illustration. Furthermore, the scope of the quotation must be justified by the purpose of the quotation. This means that one may only use as much of a work as is necessary for the specific purpose. In the case of an image, a reproduction in a very small format (thumbnail) or with a low (coarse) resolution is usually sufficient.

11. Does it matter in which form I share or link to other people's photos on social media platforms?

Yes. As long as the sharing takes place in the form of a link that remains connected to the original photo, so that the shared content disappears as soon as the linked photo is deleted, this is unproblematic in terms of copyright law.

It is different if, when sharing, the photo is resaved and uploaded and continues to exist independently of the original photo. In this case, consent is necessary in case of doubt.

12. Where can I find images that I can use, for example, to create a presentation or an annual report? Which images on Google can I use for this purpose and how do I clarify the rights of use?

In many photos on the Internet, the legal relationships are explained at the foot of the photo, in a hyper-text etc. Many rights holders are willing to allow the use of their photos free of charge or for a small fee upon request. In addition, photos published under a Creative Commons license can be redistributed, as long as the appropriate conditions are met. These conditions include at least the naming of the author (photographer). Only photos distributed under a Creative Commons Zero (CC0) license may be used or distributed freely, *i.e.*, without naming the photographer.

Getty Images and other photo agencies hold the rights to many photos. They each also maintain a stock of photos, which can be used without compensation if the relevant conditions are met. ProLitteris holds the exploitation rights to many photos and is generally willing to permit use for a fee in accordance with the tariff. Various picture agencies also provide rich collections of photographs at a flat rate.

13. What do I, as the marketing manager of a company, have to pay particular attention to when creating a brochure with pictures?

It must be ensured that use for the intended purpose, in particular for commercial purposes, is permitted. In Creative Commons images, a [crossed-out dollar pictogram indicates that](#) further use of the image for commercial purposes is not permitted.

14. What do I have to do if I want to edit a foreign photo?

The digital editing (photoshop) and mixing (photocomposing) of photos is now technically possible for everyone without any problems. If you want to edit a foreign photo in this way, you practically always have to ask the copyright holder for permission.

With Creative Commons photos, special care must be taken to ensure that [no equal sign](#) appears. This symbol means that the author prohibits editing or changing his work.

In the case of photographic works, any processing requires permission if the individual character of the original work remains recognisable despite the processing. In contrast, the scope of protection of photographic reproductions against editing must be narrower, since an individual character is not assumed for these works. Minor changes must be sufficient to leave the scope of protection of Art. 2 para. 3^{bis} CA. What is decisive is whether the reproduction is still the same reproduction on which the author's original decision to record was based. If the original rendition remains completely and largely identical in the adaptation, albeit trimmed by insignificant parts, in a different format, in a new frame, in attenuated colours (if the colours do not exactly constitute the essence of the original rendition), an adaptation requiring approval is present. If, on the other hand, the existing reproduction is only taken over in individual parts, or if essential parts of the reproduction are retouched away or essential parts are newly added, or if it only plays a subordinate role in a new, dominant context (photocomposing), then in our opinion the editing is not subject to approval, but is freely possible. The court practice will have to decide these questions.

If the adaptation of a photographic representation results in a new photographic or at least visual work, it is an original work, not a second-hand work, since no other work protected by copyright within the meaning of Art. 2, paras. 1 and 2 has been adapted.

Since photographic reproductions do not necessarily have to have an individual character, they are usually not closely linked to the personality of their author, so that it is not easy to imagine cases in which an arrangement permitted by Art. 2 para. 3^{bis} CA would constitute a distortion of the work which would injure the author's personality to such an extent that he or she could nevertheless oppose it.

15. Does my copyright also apply if I publish my photo on social media platforms (e.g., Facebook, Snapchat, Instagram, Twitter etc.)?

Yes, the principle is that protected photos continue to enjoy copyright protection even on social media platforms (see answer to question 10).

But as a user of a social media platform you have accepted its terms of use. Facebook, for example, stipulates in section 3 of the terms of use that you grant certain rights to the uploaded photos, such as the right to use, distribute, copy and publicly display them.

16. What do I have to do if I just want my photo to be spread as widely as possible?

If you are interested in the widest possible distribution of your photo, you can explicitly waive the copyright on your photo. If you do so, users can copy, modify, re-contextualize, distribute and use the photo for commercial purposes without having to ask for permission.

For example, you can also publish your photo under a so-called Creative Commons Zero (CC0) license. This is a way to let the general public know that you are interested in the widest possible and unconditional distribution.

17. Does the new regulation (also) protect the photographed object by copyright?

No. Whether the depicted object is also protected by copyright or whether the depicted person can assert personal rights is another question that is not affected by the new regulation in the CA. An object, e.g., a public domain work of art or a building within the scope of the panorama freedom, can in any case be photographed again without violating the right to an existing photographic reproduction.

The protection of photographic reproductions is only problematic in conjunction with the domiciliary rights of the respective museum, which allow the museum management to prohibit the creation of other photographs of the same object. If the existing photographs may not be used because of their copyright

protection and new photographs may not be made because of the house right, this leads to a de facto protection for the depicted object.

18. If I take a photo for my employer, who owns the rights? How is it protected by copyright?

Even if an employee takes a photograph for the employer in the performance of his or her duties, the photographer is primarily entitled to the copyright of the photograph. In practice, however, employment contracts often provide that the employee transfers the copyright to his or her works or at least grants the rights of use to the employer. In the absence of a contractual provision, it is assumed that the employee transfers those rights of use to the employer which the employer needs for its business activities.

19 What legal consequences do I face if I knowingly and willingly publish a protected image without permission?

Under criminal law, the user of a photograph without justification risks imprisonment for up to one year or a fine if the author files a criminal complaint. In addition, the author can also take civil action against someone and demand compensation for his or her damage or payment of the profit or enrichment and, if necessary, even satisfaction.

In practice, the user will typically first receive a warning (see question 24).

20 What can happen to me if I unintentionally violate copyrights in a photo, even though I was not aware that it was protected?

In this case, the author will not be prosecuted under criminal law due to the lack of intent of the infringer. But it is possible to assert civil law claims for damages and delivery of the profit or enrichment in cases of negligence, or claims based on unjust enrichment even without any fault.

21. May the company I work for suffer any consequences from a possible copyright infringement on my part?

Yes, a company can be held liable under civil law for damage, unjust enrichment and illicit profit caused by an employee in the course of business or official duties, but only if the company cannot prove that it exercised due diligence to prevent such damage.

22. Will the newly introduced protection of photographic reproductions lead to a wave of warnings as we know it from Germany?

The new legal protection of photographic reproductions in combination with automatic image search engines that search the Internet for infringing images will certainly lead to more warning letters and claims.

However, unlike in Germany, lawyers in Switzerland cannot automatically charge pre-litigation costs to a user who has used a photo illegally.

23. Must I expect to be warned if I post on my website old photographs that were taken before 1 April 2020?

Since April 1, 2020, photographs without individual character that were taken before this date are also protected, provided that they were taken not more than 50 years ago. However, one cannot be prosecuted retroactively for uses that were legal under the previous law.

You can even leave the now protected photos on a website. However, it is not clear whether this will also apply if the website is revised and expanded.

24 What should I do if I am asked by letter from a Swiss or foreign lawyer to pay compensation for the unlawful use of a photograph?

It is not advisable to simply ignore warning letters, even if they come from abroad (e.g., from Germany). In particular, as a user of photos, you will no longer be able to defend yourself by claiming that the photo is not protected by copyright because of lack of individuality. However, the infringer will still have various defensive arguments against a claim for damages or delivery for profit or unjust enrichment. It will therefore often be sufficient to stop using the photo and to make a cease and desist declaration. In any event, a cease and desist declaration should be studied very carefully before signing it.